

MTF COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT

Major John J. Siemietkowski¹

Congress passed the Americans With Disabilities Act² ("ADA" or "The Act") in 1990. The Act mandates equal opportunity for individuals with disabilities in terms of employment,³ and in terms of access to both public services⁴ and public accommodations operated by private entities.⁵ Statutorily, the Act does not apply to the military.⁶ In effect, however, there are several other laws and regulations which require the same compliance. Because of these other laws and regulations, all Military Treatment Facilities (MTFs) must comply with the ADA in terms of patients, employees, and visitors.

The Americans With Disabilities Act

Congress passed the ADA in 1990 in order to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," having found that "some 43,000,000 Americans have one or more mental disabilities, and this number is growing..."⁷

The ADA prohibits employment discrimination against disabled individuals, both in terms of hiring and conditions of employment.⁸ The Act prohibits an employer from asking an applicant about a disability unless such inquiry is shown to be job-related and consistent with business necessity.⁹ Once on the job, employers must make

¹ Center Judge Advocate, Eisenhower Army Medical Center, Fort Gordon, Georgia.

² 42 U.S.C. 12101 et seq (1998).

³ *Id.* at 12112.

⁴ *Id.* at 12132.

⁵ *Id.* at 12182.

⁶ *Id.* at 12111(5)(B)(i), 12131(1), and 12181(6).

⁷ *Id.* at 12101.

⁸ *Id.* at 12112(a).

⁹ *Id.* at 12112(d)(2)(A) and 12112(d)(4)(A); Harding, *Putting the Pieces Together: The Family and Medical Leave Act, The Americans With Disabilities Act and Workers' Compensation*, National College of District Attorneys, November 15-19, 1998, p. 14.

"reasonable accommodation" for those with disabilities.¹⁰ The Act does not require an employer to accommodate an employee if the employee poses a "direct threat" to the health or safety of the employee himself or to others. "Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.¹¹ An employer does not have to provide an accommodation if doing so imposes an "undue hardship," defined as "significant difficulty or expense."¹²

Along with prohibiting employment discrimination, the ADA also prohibits discrimination in the participation in, or benefits of, "the services, programs, or activities" of non-Federal government entities.¹³ Disabled individuals often invoke this section of the Act to demand special accommodations in prisons, schools, and universities.¹⁴

The Act further prohibits discrimination by private entities that offer public accommodations.¹⁵ The definition of "private entity" is very broad, and includes most businesses that the public enters into.¹⁶

The Act defines "disability" as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.¹⁷ "Major life activities" are those activities that the average person can perform with little or no difficulty. They do not include temporary, non-chronic impairments of short duration.¹⁸ For the most part, the "test for whether a person qualifies as disabled under the act centers not on the condition itself, but on whether the condition substantially limits them."¹⁹

Although Congress applied the Act to the Legislative Branch, it did not apply the Act to the Executive or Judicial branches.²⁰ This, along with the definitions at

¹⁰ 42 U.S.C. 12112(a).

¹¹ *Id.* at 12111(3) ; Harding at 8.

¹² 42 U.S.C. 12111(10).

¹³ *Id.* at 12132.

¹⁴ See generally Headnotes 7 and 13 under 42 U.S.C.A. 12132 (1998).

¹⁵ 42 U.S.C. 12182.

¹⁶ *Id.* at 12181.

¹⁷ *Id.* at 12102(2).

¹⁸ 29 C.F.R. 1630.2(j) (1999).

¹⁹ Harding at 1 (original emphasis).

²⁰ 42 U.S.C. 12209.

sections 12111(B), 12131(1), and 12181(6), means that the Act does not apply to the military. Despite this statutory non-applicability, however, MTF's must nonetheless comply with ADA requirements.

Why MTF's Must Comply With ADA Requirements

The first reason that MTF's must comply with the ADA is that it is a JCAHO requirement, at least in terms of hiring and terms of employment.²¹ Therefore, if a MTF intends to pass its JCAHO survey, it must be prepared to comply with the Act.

Along with JCAHO compliance, several federal statutes also require MTF compliance with ADA standards.

The Rehabilitation Act of 1973 states that

no otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency...²²

Like the ADA, the Rehabilitation Act also prohibits discrimination in the hiring and employment of handicapped individuals.²³ Because the Rehabilitation Act applies specifically to the Executive Branch, MTFs must by definition follow its guidelines.

The Architectural Barrier Act of 1968 requires all Federal buildings designed, constructed, or altered after 1968 to be accessible and usable by persons with disabilities.²⁴ Section 4154 of this act specifically requires the Secretary of Defense to insure that handicapped individuals have access to DOD buildings.²⁵

²¹ Joint Commission on Accreditation of Healthcare Organizations, 1998 Hospital Accreditation Standards, p. 251 footnote.

²² 29 U.S.C. 794

²³ *Id.* at 791.

²⁴ 42 U.S.C. 4151-4157.

²⁵ In light of section 4154, the military exclusion in section 4151 appears aimed at training facilities designed for "able bodied" soldiers, as opposed to hospitals, headquarters buildings, and AAFES facilities designed as much for non-soldiers as for soldiers.

This statute therefore requires post-1968 MTF's to comply with ADA-type standards.

Along with these general laws, two other statutes address handicapped access in specific areas within the Federal workplace. The Telecommunications Enhancement Act of 1988 requires that Federal telecommunications systems be fully accessible "to hearing-impaired and speech-impaired individuals, including Federal employees, for communications with and within Federal agencies."²⁶ Congress also amended the Rehabilitation Act of 1973 to require Federal agencies to provide access by disabled individuals to computer and information technology.²⁷

Beyond Federal statutes, Federal regulations also require MTF compliance with ADA standards.

36 C.F.R. 1190.1 (1999) requires that buildings constructed with Federal funds be "designed, constructed, or altered so as to be readily accessible to, and usable by, physically handicapped persons." 36 C.F.R. 1191.1 (1999) proscribes accessibility guidelines for purposes of compliance with the ADA.

The major Army Regulation dealing with ADA compliance is 600-7, "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".²⁸ Section 1.4 of this regulation states, "The Army's policy is that no qualified handicapped person will be subjected to discrimination on the basis of handicap in any program or activity that receives or benefits from Federal financial assistance disbursed by DA." The regulation tasks the heads of installations and activities with implementing the regulatory guidance, with the assistance of EEO officers.²⁹ The regulation prohibits discrimination in employment and accessibility matters.³⁰

For existing Army facilities, a "DA component will operate programs or activities so that they are readily accessible to, and usable by, handicapped persons.

²⁶ 40 U.S.C. 762(a).

²⁷ 29 U.S.C. 794(d).

²⁸ Army Reg. 600-7, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army (15 November 1983) [hereinafter 600-7].

²⁹ 600-7, paras. 1.7 and 1.8.

³⁰ Id. at para. 2.5 and section 3.0.

However, this does not necessarily require a recipient or DA component to make each of its existing facilities or every part usable by handicapped persons."³¹ For further guidance in determining accessibility of Army facilities, the regulation refers readers to Office of the Chief of Engineers Manual EM 1110-1-103.³² The regulation also suggests several specific examples of compliance, such as redesign of telephone equipment, relocation of classes or services to accessible buildings, use of sign-language interpreters, home visits, and delivery of health services at accessible alternative sites.³³ The regulation also states that, in choosing among alternative methods of compliance, the DA component "will give priority to methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with non-handicapped persons."³⁴

For new construction, or alterations to existing facilities, "new facilities and alterations to existing facilities will be designed and constructed to be accessible and usable by handicapped persons."³⁵

Like the ADA itself, AR 600-7 only requires "reasonable accommodation" to the "known physical or mental limitations of an otherwise qualified handicapped" person.³⁶ Reasonable accommodation is not necessary if the DA component demonstrates "that the accommodation would impose an undue hardship..."³⁷ The regulation offers several suggestions for "reasonable accommodation," including modified work schedules and sign-language interpreters.³⁸ The regulation also suggests factors in defining "undue hardship," such as the size of the activity, the number of employees, the activity's budget, and the nature and cost of the accommodation needed.³⁹

Along with AR 600-7, another Army Regulation also addresses access by the disabled to Army facilities and programs. The Army Community Service regulation states, "No qualified disabled person will, on the basis of

³¹ *Id.* at para. 3.2a.

³² *Id.* at para. 3.2a(1).

³³ *Id.* at 3.2c.

³⁴ *Id.* at 3.2e.

³⁵ *Id.* at 3.3.

³⁶ *Id.* at 3.4a.

³⁷ *Id.*

³⁸ *Id.* at 3.4b.

³⁹ *Id.* at 3.4c.

disability, be excluded from participation in, be denied the benefit of, or otherwise subjected to discrimination under ACS programs."⁴⁰ This regulation also emphasizes "reasonable accommodation" and offers suggestions for making such reasonable accommodations.⁴¹

Major General Cuddy, the former MEDCOM Chief of Staff, also emphasized accommodation for disabled individuals in a memo addressed to all MEDCOM subordinate commanders dated 12 June 1998.⁴² He stressed compliance in employment matters, as well as for those who use MEDCOM facilities.⁴³ He mandated awareness training for staff, especially in terms of what to do if someone files a complaint.⁴⁴

It is therefore clear that, although the ADA does not technically apply to MTF's, other laws, regulations, and command guidance mandate MTF compliance with ADA standards.

Putting the ADA Into Practice in MTF's

So where does a MTF staff turn for guidance when putting all this into practice at a particular MTF? There is a lot of information available on the ADA standards from the Department of Justice, the Equal Employment Opportunity Commission, other government entities, and private organizations. The DOJ ADA Information Line is 1-800-514-0301 (1-800-514-0383 TDD). DOJ also has a wealth of ADA information available on its web site: www.usdoj.gov/crt/ada. The EEOC has an ADA website at: www.eeoc.gov/facts/fs-ada. The Architectural and Transportation Barriers Compliance Board offers technical assistance at: www.access-board.gov. The President's Committee on Employment of People with Disabilities answers employment questions at: www.pcepd.gov. The Council for Disability Rights has a great "frequently asked questions" section on its web site at: www.disabilityrights.org. The National Center for Law and Deafness also offers assistance at 1-800-651-5381 (fax) 1-800-651-5373 (TDD).

⁴⁰ Army Reg. 608-1, para. 1.8a (23 February 1998)

⁴¹ *Id.* at para. 1.8b.

⁴² Memo, Office of the MEDCOM Chief of Staff, 12 June 1998, subject: Reasonable Accommodation and Access to Services for Individuals with Disabilities.

⁴³ *Id.*

⁴⁴ *Id.*

There is definitely a need for MTF staff to put all this into practice at their respective MTFs. As of June 1998, the MEDCOM EEO was investigating two ADA-type complaints filed by family members. In one case, the MTF staff allegedly did not provide a deaf military dependent with a sign language interpreter, even though the dependent had given sufficient notice of the request. In the second case, the staff allegedly did not give a wheelchair-bound family member the assistance necessary for a routine exam.⁴⁵

When applying ADA standards in MTFs, it is important to remember that accommodations need only be "reasonable", and will not be required if they create an "undue hardship." MTF staff must view a proposed accommodation in light of how difficult and expensive it will be to implement, how often it will be used, and alternative accommodations.

Handicapped parking spaces and curbside ramps may be fairly easy and inexpensive to install to facilitate visitor and employee access. Likewise, providing a number of wheelchairs near an entrance does not seem overly burdensome.

Being burdensome, though, would not necessarily mean that an MTF could avoid making an accommodation. It may be expensive to install a TDD telephone system for patients (and staff) who have difficulty hearing. But if there is a large patient and staff population with hearing problems, then the law probably requires spending the money to install the TDD system. If a voice-activated computer system costs an extra \$1,000.00, then the law probably requires assuming that extra financial burden for an employee without the use of her hands.⁴⁶

The key to ADA compliance seems to be finding reasonable alternatives which are satisfactory to the disabled individual and to the MTF. If a disabled patient can't reach a particular clinic because of no elevator access, it probably makes more sense to refer the patient to an accessible civilian clinic rather than moving the military clinic itself. Or, the military provider could

⁴⁵ Information Paper, MEDCOM Office of EEO Programs, Subject: Reasonable Accommodation and Access to Services for Individuals with Disabilities, 4 June 1998.

⁴⁶ On the other hand, if that same system costs an extra \$100,000, then that is probably an undue hardship.

perhaps see the patient in another clinic which is accessible to the patient. If a blind patient requests a seeing eye dog during a MTF visit and none are available, the patient would probably accept a staff member as an escort instead. On the other hand, the law may require a seeing eye dog for a blind employee in lieu of a constant staff escort. If a deaf family member cannot hear what the doctor is saying regarding a loved one, the MTF could provide a sign-language interpreter. Or perhaps the doctor could just write down what he is saying for the deaf family member.⁴⁷ Although not always possible, the key to ADA compliance seems to be finding reasonable accommodation alternatives for patients, employees, and visitors.

Processing Complaints

Paragraph 4.1 of AR 600-7 has a long and detailed discussion of how MTFs should process complaints from disabled individuals. Disabled individuals should present their complaints to the EEO office. The EEO office then has the lead for addressing those complaints.

As a practical matter, disabled individuals may also want to lodge complaints with the Patient Representative or the IG. In certain circumstances, it may be also appropriate for an individual to seek assistance from the CPO or from a Legal Assistance attorney.

The Role of the JAG

To secure ADA compliance, MEDCOM recommends establishing a clear policy, developing and distributing easily understood SOPs, and doing the right training for the right people.⁴⁸ JAGs should take an active role in these activities.

⁴⁷ When discussing examples, it is worthy to note that AIDS and HIV are considered disabilities under the ADA to the extent they substantially limit major life activities. *Saladin v. Turner*, 936 F.Supp. 1571 (N.D. Okla. 1996); *Hoepfl v. Barlow*, 906 F.Supp. 317 (E.D. Va. 1995); *U.S. v. Morvant*, 898 F.Supp. 1157 (E.D. La. 1995). It may also be worth noting that simply being a transvestite may not qualify someone as "disabled." 42 U.S.C. 12208.

⁴⁸ Information Paper, MEDCOM Office of EEO Programs, Subject: Reasonable Accommodation and Access to Services for Individuals with Disabilities, 4 June 1998.

Attorneys, familiar with the law and with the facts of their particular MTF, should be able to formulate a compliance policy. This ought to be a very brief (one page) summary of compliance requirements, the MTF's commitment to those compliance requirements, and how to process complaints. The MTF ought to post this policy in employee handbooks and in public areas for patients, employees, and visitors to see.

JAGs should also get involved in developing easily understood SOPs. Those closer to compliance issues (perhaps the Patient Administrative Division or the Patient Rights Committee) should probably take the lead with developing a SOP because they will know what types of compliance questions the staff will need answered in a SOP. Although longer than the policy, the SOP should also be short to ensure easy access and understanding by the staff.

JAGs should also be proactive in providing the right training for the right people. We should try to sift through all the legalese and boil down the ADA requirements into easily understood concepts. We should then try to disseminate these concepts through customer relations training, newcomers and birthmonth orientations, and articles in the MTF newsletter. Most importantly, we must encourage staff (including EEO) to seek our assistance when compliance issues arise.

JAGs clearly do not bear the entire burden for policy, SOP, and training guidance, but we are in a unique position as the command's legal counsel to help transform legal requirements into practical applications.

Conclusion

The Americans with Disabilities Act mandates equal opportunity for individuals with disabilities in terms of employment, and in terms of access to both public services and public accommodations operated by private entities. Statutorily, the Act does not apply to the military. In effect, however, there are several other laws and regulations which require the same compliance. Because of these other laws and regulations, all Military Treatment Facilities (MTFs) must comply with the ADA in terms of patients, employees, and visitors. Judge Advocates should play an active role in policy drafting and staff training.

